No. 11902

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FREEMAN STEAMSHIP COMPANY and FIREMAN'S FUND INSURANCE COMPANY,

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner, U. S. EMPLOYEES' COMPENSATION COMMISSION,

Appellee.

APPELLANTS' REPLY BRIEF.

LASHER B. GALLAGHER,
458 South Spring Street, Los Angeles 13,
Proctor for Appellants.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases

Statutes

No. 11902

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FREEMAN STEAMSHIP COMPANY and FIREMAN'S FUND INSURANCE COMPANY,

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner, U. S. EMPLOYEES' COMPENSATION COMMISSION,

Appellee.

APPELLANTS' REPLY BRIEF.

Appellants will reply to appellee's points in the same order in which they are set forth in appellee's brief.

I.

Crowell v. Benson, 285 U. S. 22, Fully Supports Appellants' Right to a Trial de Novo on the Issue as to Whether the Claimant Is the Surviving Wife of the Deceased Employee and the Doctrine of That Case Has Not Been Overuled or Limited by Any Decision.

It is apparent from appellee's brief that both he and the appellants have made a thorough search for decisions by the Supreme Court subsequent to the case of *Crowell v.*

Benson, for the purpose of ascertaining whether that decision has been overruled or limited. Appellee was unable to find any case wherein the Supreme Court overrules or limits the *Crowell* decision. All of the cases referred to by the appellee in his brief have been re-examined by appellants and they are unable to find anything therein said which remotely supports the contention of the appellee that "the doctrine of trial *de novo* as to jurisdictional facts laid down in *Crowell v. Benson* no longer retains vitality in the light of later decisions by the Supreme Court." (App. Br. p. 5.)

Although appellants quoted only a portion of the language used by the Supreme Court in the case of *Crowell v. Benson* in their opening brief, on page 6, they thought that portion would be sufficient because it highlighted the importance of the relation between the two parties involved in that case which the Supreme Court stated was the pivot of the statute and which underlies the constitutionality of the statute in so far as it purported to provide for liability without fault.

An examination of the complete opinion in the case of *Crowell v. Benson* strongly supports the contention of the appellants that they were entitled to a trial *de novo* in the District Court with reference to whether or not the claimant was the surviving wife of Walter Olcott. In 285 U. S., at pages 37 and 38, the Supreme Court stated that the act has two limitations that are fundamental. Of course, in that case the Court was not dealing with a claim made by a widow and therefore the two fundamental *limitations* referred to were (1) that the injury must occur upon the navigable waters of the United States and (2) that the act applies only when the relation of master and servant exists.

Thus two constitutional issues were involved in that case. The first one relates to the power of the Congress to legislate with reference to maritime matters. The second relates to the power of the Congress to impose liability without fault.

The fact that the Court was considering fundamental issues and applying well established principles is clear from that part of the opinion commencing in 285 U. S. at page 56. The Court says:

> "In the present instance, the Congress has imposed liability without fault only where the relation of master and servant exists in maritime employment and, while we hold that the Congress could do this, the fact of that relation is the pivot of the statute and, in the absence of any other justification, underlies the constitutionality of this enactment. If the person injured was not an employee of the person sought to be held, or if the injury did not occur upon the navigable waters of the United States, there is no ground for an assertion that the person against whom the proceeding was directed could constitutionally be subjected, in the absence of fault upon his part, to the liability which the statute creates.
>
> "In relation to these basic facts, the question is not the ordinary one as to the propriety of provision for administrative determinations. Nor have we simply the question of due process in relation to notice and hearing. It is rather a question of the appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restrictions. It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency —in this instance a single deputy commissioner—for the final determination of the existence of the facts

upon which the enforcement of the constitutional rights of the citizen depend." (285 U. S. at pp. 56, 57.)

The Court specifically refers to cases involving proceedings in the Land Office, Boards and Commissions created by the Congress such as the Interstate Commerce Commission and cases involving the right to a trial *de novo* upon *habeas corpus* proceedings. The sum and substance of what the Court says with reference to these last mentioned matters is that if there is a condition precedent in a statute providing for administrative decision, such condition precedent must exist or the administrative body has no authority to proceed. For instance, when proceedings are taken against a person under a military law and enlistment is denied, the issue has been tried and determined *de novo* upon *habeas corpus;* in the administration of the public land system, questions of fact are for the consideration and judgment of the Land Department and its decision of such questions is conclusive, but if the lands never were public property, or had previously been disposed of, or if Congress had made no provision for their sale, or had reserved them, such matters, disclosing a want of jurisdiction, may be considered by a court of law.

As the Court said at page 59:

"This Court has held that 'matters of this kind, disclosing a want of jurisdiction, may be considered by a court of law. In such cases the objection to the patent reaches beyond the action of the special tribunal, and goes to the existence of a subject upon which it was competent to act.'" (285 U. S. at p. 59.)

The Court also said at page 59:

> "The question whether a publication is a 'book' or a 'periodical' has been reviewed upon the evidence received in a suit brought to restrain the Postmaster General from acting beyond his authority in excluding the publication from carriage as second-class mail matter." (285 U. S. at p. 59.)

On page 60 of the decision the Court says:

> "Jurisdiction in the Executive to order deportation exists only if the person arrested is an alien, and while, if there were jurisdiction, the findings of fact of the Executive Department would be conclusive, the claim of citizenship 'is a denial of an essential jurisdictional fact' both in the statutory and the constitutional sense, and a writ of *habeas corpus* will issue 'to determine the status.'" (285 U. S. at p. 60.)

The Court in its opinion uses the words "fundamental or jurisdictional facts" as synonymous. The rules set forth in the *Crowell* case are clearly applicable to the case at bar. The Congress did not purport to establish liability without fault in the absence of the relation of employer and employee which was involved in the *Crowell* case. Neither did the Congress attempt to impose liability without fault on the part of the employer of a longshoreman fatally injured while performing work on navigable waters of the United States, in favor of any woman who was not the actual surviving wife of the deceased. The appellants here are not contending that the Longshoremen's and Harbor Workers' Compensation Act is unconstitutional in its provision that if the injury causes death, the compensation shall be payable if there be a surviving wife. Their point is that unless there is a surviving wife there is

nothing in the act which gives the deputy commissioner any power to award a death benefit any more than he could make an award if the relationship of employer and employee did not exist between a person proceeded against by a living but injured employee.

It is elementary that the Longshoremen's and Harbor Workers' Compensation Act must be considered as a whole, regardless of the fact that it is divided into sections. The "coverage" section which provides that compensation shall be payable under the chapter in respect of disability or death of an employee but only if the disability or death results from an injury occurring upon the navigable waters of the United States, must be read in conjunction with Section 909. When so read, as applied to the facts of the case at bar, the statute would appear as follows: Compensation shall be payable under this chapter in respect of the death of an employee, only if the death results from an injury occurring upon the navigable waters of the United States and only if there be a surviving wife.

If appellants have fairly epitomized the meaning of the statute then it is clear that the status of the claimant is a fundamental and jurisdictional fact and involves both statutory and constitutional jurisdictional questions.

The Supreme Court said (*Crowell v. Benson,* 285 U. S. at 54, 55):

> "What has been said thus far relates to the determination of claims of employees within the purview of the Act. A different question is presented where the determinations of fact are fundamental or 'jurisdictional,' in the sense that their existence is a condition precedent to the operation of the statutory

scheme. These fundamental requirements are that the injury occurs upon the navigable waters of the United States and that the relation of master and servant exists." (285 U. S. at pp. 54, 55.)

The last sentence in the language just quoted is seized upon by appellee in support of his contention that the only fundamental requirements as to which a trial *de novo* may be had are those with reference to the place where the injury occurred and the relationship of master and servant. Appellants' answer to that contention is that the language used must be understood in the light of the facts and issues which were before the Court. The first sentence in the quoted matter is applicable as a matter of principle and is not restricted to the particular factual situation then before the Court. It is the appellants' contention that the existence of the status of surviving wife is a fundamental or jurisdictional fact in the sense that its existence is a condition precedent to the operation of the statutory scheme in any case involving the death of a longshoreman.

The fact that the particular point involved in the case at bar has not had the attention of any federal court of appellate jurisdiction up to this time is of no moment for the reason that in the vast number of cases which have been processed by the United States Employees' Compensation Commission there has never arisen a case wherein this point was present. There are likewise very few cases wherein a trial *de novo* has been claimed upon the ground that there was a dispute as to the existence of the relationship of employer and employee or the fact that the injury or death occurred upon navigable waters of the United States.

In *Cardillo v. Liberty Mutual Insurance Co.,* 330 U. S. 469, one of the cases cited by appellee, at page 474 the Court says:

> "The jurisdiction of the Deputy Commissioner to consider the claim in this case rests upon the statement in the District of Columbia Act that it 'shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person.' There is no question here but that Ticer was employed by a District of Columbia employer; the latter had its place of business in the district and engaged in construction work in the district, as well as in the surrounding areas." (330 U. S. at p. 474.)

Again, at page 477, the Court says:

> "Hence we conclude that the Deputy Commissioner had jurisdiction under the District of Columbia Act to entertain a claim by a *widow* of an employee who had been a resident of the District, who had been employed by a District employer and who had been subject to work assignments in the District." (Emphasis added.) (330 U. S. at p. 477.)

Putting these two parts of the opinion together it is quite clear that the Supreme Court determined that one of the jurisdictional facts was the actual existence of a

widow. The Court did not say that the Commissioner had the final and conclusive right to determine that the claimant in the *Cardillo* case was the widow. All the Court said was that the Deputy Commissioner had jurisdiction under the District of Columbia Act to *entertain a claim* by a *widow* of an employee, etc.

As applied to the facts in the case at bar the Deputy Commissioner had no jurisdiction to consider any claim by any woman who wasn't a surviving wife of the deceased employee.

There is nothing in the *Cardillo* case which overrules or limits the *Crowell* case. There is nothing which appellants can find in the *Cardillo* case which holds that the courts are conclusively bound by a legal conclusion of a deputy commissioner as to the existence of a legal relationship which is a condition precedent to the right to receive an award, when the facts as introduced in evidence do not conform to the requirements of the applicable law which specifies how the legal relationship may be created. In the case at bar the law which specified how the legal relationship of husband and wife could have been created between the claimant and the deceased employee is the law of Mexico and appellants are unable to understand how the Deputy Commissioner in the case at bar can be said to have had the final and conclusive right, to the exclusion of the courts, to say that the claimant was the surviving wife of the deceased regardless of the fact that her claim of marriage was not in any sense in accordance with the applicable Mexican law.

In the case of *Tyler v. Lowe,* 138 F. (2d) 867, the Second Circuit expresses no view that the rule established in *Crowell v. Benson* as to a trial *de novo* on fundamental or jurisdictional facts has been overruled or limited in any way. It refers specifically to the *Crowell* case and evidently accepted it as the law applicable to the subject. If the Second Circuit had been of the opinion that the *Crowell* case had been devitalized in any respect it would no doubt have said so.

In *Metropolitan Casualty Company v. Hoage,* 72 F. (2d) 175, 176, the Court says:

> "There is no dispute as to the cause of Brown's death. The question before us is solely the fact of employment, and, as this fact is an essential condition precedent to the right to make the claim, the proceeding in the court below was, in our opinion, entirely proper. Crowell v. Benson, 285 U. S. 22, 62 S. Ct. 285, 76 L. Ed. 598." (72 F. (2d) 175, 176.)

In the *Metropolitan Casualty Company* case the District Court tried the question of employment *de novo* and the Circuit Court of Appeals approved this procedure for the reason that the fact of employment was an essential condition precedent to the right to make the claim.

II.

The Deputy Commissioner's Finding That Claimant Is the Widow of the Deceased Employee Is Not Supported by Evidence.

The appellee cites California statutes and cases in support of his contention that the evidence introduced before the Deputy Commissioner is legally sufficient to support what the appellee calls a finding of fact, to wit, "that Cora E. Olcott, claimant herein, . . . is the widow of the deceased employee, Walter Olcott, was married to him August 26, 1926, and was living with him as his wife and dependent upon him for support at the time of his injury." (App. Br. p. 11.)

Appellants contend that whether or not the claimant is the surviving wife of Walter Olcott must be determined solely by reference to the substantive law involved. That substantive law is the law of Mexico in full force and effect in August, 1926, and the law of the State of California, where the parties were domiciled according to the evidence, is of no importance. While it may be true that in the absence of evidence to the contrary the Commissioner might have been justified in presuming that the law of Mexico was the same as that of California in August of 1926, this presumption cannot stand in the face of uncontradicted evidence showing that the law of Mexico with reference to the essential prerequisites of a valid and legal marriage was different from those of California.

Appellee was unable to find any substantial ground upon which to criticize the evidence offered by the employer and its insurance carrier with reference to the law of Mexico or the independent investigation with reference to that law which was made by the Deputy Commissioner by let-

ters. In the final analysis the appellee's contention with reference to the Mexican law is set forth on page 18 of his brief as follows:

> "However, the Mexican law and its application to the case was a question of fact to be determined by the Deputy Commissioner as the trier of fact."

Appellee cites in support of this statement in his brief the case of *Shapleigh v. Mier,* 83 F. (2d) 673. In that case the Court said, with reference to certain Mexican laws, as follows:

> "Questions as to their meaning and application were fully discussed by expert witnesses of both sides *who contradicted one another widely.* We are of opinion that the Mexican law and its application to this case was a question of fact and rightly disposed of as such by the District Judge, if he had any right to go into the question at all." (Emphasis added.) (83 F. (2d) at pp. 676, 677.)

It thus appears that the reason the Mexican law was a question of fact was that the evidence with reference thereto was contradictory. There is no conflict in the case at bar with reference to the Mexican law. If there had been conflicting evidence in the case at bar with experts on one side testifying that the law of Mexico in effect in August, 1926, permitted persons to be married by a "preacher" then there would have been a conflict and the Deputy Commissioner would have been justified in deciding, as a question of fact, the actual Mexican law.

There was no claim made by the claimant in the proceedings before the Deputy Commissioner that she was married by proxy or that she was married in any place excepting at Tijuana, Mexico. In her Claim she stated

that she "was married to the deceased on 26th day of Aug., 1926 at Tijuana, Mexico by a Judge of the First Instance." [Ap. 58.]

It is the contention of the appellants that the mere conclusion of the claimant that she was married to Walter Olcott on August 26, 1926, at Tijuana, Mexico, and that Walter Olcott told John Roberts that "we got married by a preacher" is not legally sufficient to prove a legal marriage in spite of the fact that from and after August 26, 1926, the two persons lived together in San Diego County as husband and wife. The presumptions which are contained in the California Code of Civil Procedure relate to procedural matters only, to wit, evidence. This section of the California Code of Civil Procedure is not in any sense substantive proof. The appellants cited cases in their opening brief with reference to the lack of probative effect of a presumption in a federal court when there is any substantial evidence to rebut the presumption and appellee makes no attempt to reply to the argument or the authorities. (See App. Op. Br. p. 20.)

If we compare what the claimant and her witness John Roberts testified to before the Deputy Commissioner with the requirements of the Mexican law, it is obvious that there never was any marriage. The appellee refers, on page 18 of his brief, to what he evidently concedes was part of the Mexican law governing family relations which was in effect in 1926 for the Federal District and Territory of Lower California in which Tijuana is located. Article 3 of that law provides as follows:

> "On the day and hour *designated* for the performance of the marriage, there must be present before the *Civil Judge,* at the place the *latter* may have determined upon, the parties thereto, in person or through a special representative legitimately ap-

> pointed, and in addition two witnesses for each one of the parties themselves, to vouch for their identity, as well as the parents or guardians of the parties, if any, and if they should desire to attend the ceremony. * * *" [Ap. 172.]

The claimant testified that she was married by a preacher. [Ap. 9.] Therefore, she wasn't present before any Civil Judge. She also testified that she did not know anyone else who was present at the purported marriage excepting Walter Olcott. Therefore, she did not have two witnesses to vouch for her identity.

This provision of the Mexican law is corroborative of the testimony of the witness Jesus Ruiz who said in this respect as follows:

> "* * * the petition is filed; the judge calls on each of the persons who have signed an application, one at a time, in order that they may say whether or not that which is written is true. When the applications are presented to the judge, he calls them all in to ratify it. Then after ratifying the application *he* fixes a time within eight days, and then when they are all present *again* he asks those who are to be married if they ratify their applications still, and if they still wish to be married, he then declares them to be married in the name of the law and in the name of society, and all that procedure is thereupon recorded in a book." (Emphasis added.) [Ap. 26.]

It is clear from Article 3 of the Mexican law set forth in the letter from the Embassy of the United States of America at Mexico City to the Deputy Commissioner that persons could not appear before the Judge on a single occasion and be lawfully married. It is also clear from Article 3 of the Mexican law, governing family relations,

supra, that the day and hour for the performance of a marriage is designated in advance of the actual performance of the marriage. This dovetails with the testimony of Ruiz with reference to the requirement of two separate appearances.

Appellee is significantly silent with reference to the letters written by the Deputy Commissioner to Senor Ballestero, who was connected with the Consulate of Mexico, and the answers received by the Deputy Commissioner from Senor Ballestero. [Ap. 158-164, 167, 168, 173, 174.]

In answer to the first letter written by the Deputy Commissioner with reference to the possibility of a marriage between claimant and Walter Olcott in the absence of a record, Senor Ballestero said:

> "* * * from the information stated above, it is impossible that Mr. and Mrs. Olcott were validly married at Tijuana. The Civil Register Offices have been in existence in Tijuana and instituted since 1914, and in this particular case, the records having not been destroyed or effaced, and since none of the leaves are missing on which it might be supposed the record was made, and since therefore, no proof of the fact or act by means of instruments or witnesses may be received; and there being a duplicate book of the register which does not contain any record of such marriage, *it is impossible that Mr. and Mrs. Olcott could have been legally or colorably married in Tijuana.* They might have appeared before some person, but without any authority to perform marriages." [Ap. 163.]

There was plenty of opportunity for the claimant to have disputed the evidence with reference to the Mexican

law in the event she had any ground upon which she could have refuted the testimony of the witness Ruiz, the opinions of Senor Ballestero or the statements made in the other correspondence conducted by the Deputy Commissioner with the Embassy of the United States of America at Mexico City. She offered no such proof.

Appellants refer particularly to the letter dated January 17, 1946, from the Embassy of the United States of America at Mexico City wherein was included a translation of Article 157 of the Mexican Civil Code which provides that "marriages may be performed before the *officials* stipulated in the law, and with all the *formalities* therein required." (Emphasis added.) [Ap. 171.]

In the testimony of Mr. Ruiz he stated as follows:

> "Since 1884 up to date neither a priest nor minister of the gospel could perform a marriage in Lower California." [Ap. 11.]

This is in accordance with the provisions in Article 157 of the Mexican Civil Code which, as is set forth in the letter from the Embassy of the United States of America, *supra,* was issued on March 31, 1884.

It therefore appears clear that legal marriages in Mexico could not have been performed by anyone but an official stipulated in the law and with all the formalities therein required. This would exclude a preacher. The letter from the Embassy also corroborates Mr. Ruiz' testimony that "there was no such thing as a religious marriage. That is prohibited." [Ap. 11.]

In conclusion with reference to this point appellants contend that there is no basis in the record for any contention that there was any oral testimony as to the solemnization of a marriage. The mere statement of a conclusion by the claimant that she was married does not amount to

testimony of the solemnization of a marriage. In other words, if a person testified that "I was married in California by a Supervisor of the city and county of San Francisco on January 2, 1942," such testimony would not rise to the dignity of testimony as to the solemnization of a marriage. In the first place, a Supervisor has no lawful authority to marry anybody and that would seem to put an end to the matter. In the second place, the mere statement "I was married" is not testimony which shows even an attempt to prove the solemnization of a marriage. Appellants' idea of oral testimony which might amount to proof of the solemnization of a marriage is that the ceremony be described by showing where the ceremony occurred, who was present, and the circumstances of all that was said and done by the persons taking part in the ceremony and the person who was conducting the ceremony.

It also seems very strange that a woman is unable to tell where she was married, if in fact she was married. Even a man would remember such an important fact as a marriage and would know where it occurred and what happened and who performed the marriage. The claimant in this case wasn't able to answer any of these questions when she consulted Mr. Ruiz. He testified as follows:

> "I also asked the lady if she remembered in what building she had been married, and if it was on the lower floor or upstairs. She could not explain to me how she got married." [Ap. 39, 40.]

There is no doubt about the fact that Mr. Pillsbury was very sympathetic with the claimant. This is demonstrated by the things he said during the hearing and which are set forth in the Apostles and the letters which he wrote in an evident attempt to bolster the claimant's case.

III.

Appellants Have Been Deprived of Their Property Without Due Process of Law.

Appellee objects to a consideration of the contention of appellants that the manner in which the Deputy Commissioner conducted the hearing deprived them of their property without due process of law for the reason that there was no allegation in the libel raising that point.

In the District Court the appellee filed a Motion for Summary Judgment. Appellants filed a Memorandum of Points and Authorities in opposition to this motion and in Point Number 3 contended that "the proceedings before the deputy commissioner were in contravention of the due process clause of the 5th Amendment, U. S. Constitution." [Ap. 206.]

Thereafter the appellants incorporated the foregoing point in their Opening Brief on the merits. [Ap. 218.] Appellee filed his answering brief in which he said:

> "Since libelants and respondent in their respective briefs, which were submitted upon the motion for summary judgment, discussed fully the law and the facts relating to this case, respondent, like the libelants, incorporates herein by reference thereto the memorandum submitted by respondent in support of the motion for summary judgment." [Ap. 221.]

It thus appears from the record that the question whether or not the appellants were deprived of their property without due process of law in so far as the action of the Deputy Commissioner was concerned was regarded as an issue and it is too late for the appellee at this date to claim otherwise. Having conceded in the trial court that

the issue was in the case, appellee is estopped to dispute that fact at this time. If any objection had been made upon the ground that the constitutional point was not pleaded it could have been cured easily by an amendment to the libel.

The foregoing has nothing to do with the contention of the appellants that the rulings of the District Court were and each thereof was in contravention of the Fifth Amendment to the Constitution of the United States. There is no requirement that a constitutional point arising from the action of a trial court be set forth in a pleading.

Conclusion.

It is respectfully contended that appellants have fully answered the arguments of appellee and that appellants are entitled to affirmative relief as prayed in the conclusion to their Opening Brief.

Respectfully submitted,

LASHER B. GALLAGHER,
Proctor for Appellants.